82-1908

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MANUEL CARDOSA and MARY L. CARDOSA,
Petitioners,

vs.

LUCY MORALES,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California Fifth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners' right to due process was abrogated by the trial court's order that a lapsed and cancelled contract be specifically performed.

2. Whether the refusal by the trial, appellate and supreme courts of the State of California acted in a manner repugnant to the Constitution of the United States and violative of petitioners' right to due process by not considering the controlling California legal authorities in granting respondent specific performance.

3. Whether the proceedings, at all levels of the judicial system of the State of California, were so tainted and besmirched by illegality and the appearance of impropriety as to effectively deny petitioners due process.

PARTIES TO THE PROCEEDING BELOW

All parties appear in the caption of the case in the United States Supreme Court.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

MANUEL CARDOSA and MARY L. CARDOSA,

Petitioners,

vs.

LUCY M. MORALES,

Respondent.

PETITION FOR
WRIT OF CERTIORARI
TO THE
COURT OF APPEAL
OF THE STATE OF CALIFORNIA

MANUEL CARDOSA and MARY L. CARDOSA, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fifth Appellate District, entered on November 30, 1982.

OPINIONS BELOW

The unpublished opinion of the Court of Appeal of the State of California, Fifth Appellate District, is printed in Appendix "A" below. The denial by the Court of Appeal of the State of California, Fifth Appellate District, of the Petition for Rehearing is printed below in Appendix "B". The denial by the Supreme Court of the State of California of the Petition for Rehearing is printed in Appendix "C" below.

JURISDICTION

The judgment of the Court of Appeals, State of California, Fifth Appellate District, which petitioners seek to have reviewed, was entered on November 30, 1982. A petition for rehearing by the Court of Appeal of the State of California, Fifth Appellate District, was denied on December 30, 1983. A petition for hearing in the California Supreme Court was

denied on January 26, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This case arises out of a purchase and sale of real property. On July 28, 1977, Jo Emma Morales and Lucy Morales, Respondents herein, went to the home of

Manuel and Mary Cardosa, petitioners herein, to discuss purchasing some real property at Pismo Beach, California. At that time, an agreement was reached wherein Respondents were to purchase the property from Petitioners for the purchase price of $98,000.00 (ninety-eight thousand dollars). Petitioners desired to retain a portion of the lot in fee, and Jo Emma Morales was agreeable to that arrangement.

On July 29, 1977, Jo Emma Morales went to the Bank of America to open escrow and directed that the instructions be prepared. The escrow instructions were in the name of Lucy Morales, who was Jo Emma Morales' mother, because of legal procedures having to do with Jo Emma Morales' separation from her husband. Jo Emma Morales will hereinafter be referred to as "Respondent". Thereafter, the instructions were signed by both parties.

The closing date in the escrow instructions was September 25, 1977.

Prior to the time the deed was deposited in escrow, Petitioners discovered that the instructions erroneously described the portion of the lot retained by petitioners as an easement rather than a reservation. This fact was communicated to respondent. The parties agreed that there was to be a reservation in the deed, and the trial courts' judgment implicitly made that finding. Respondent approved the reservation as written by placing her initials on the document as written with the reservation. On November 29, 1977, the deed with the reservation in favor of sellers and petitioners herein and the money from the buyer, respondent herein, were placed into escrow. The escrow officer had the deed delivered to the title company and asked them to record on the following day, November 10,

1977. The title company informed the escrow officer that they could not record the document because it contained an illegal lot split. In order to get the lot line adjustment, the owner would have to go through the planning commission of the city of Pismo Beach.

Upon learning of the delay before escrow could close, Petitioner and his attorney wrote to the escrow officer and cancelled the escrow pursuant to the terms for cancellation contained in the instructions. The letters were received by the escrow officer on December 2, 1977. No contract for the purchase and sale of the real property existed at any time after December 2, 1977, and petitioners' aforesaid cancellation of the escrow.

On February 9, 1978, Respondent filed suit for specific performance. A trial was held in the Superior Court of the State of California, County of San

Luis Obispo, on July 10 and 11, 1979. At the close of the trial, the judge requested briefs on the legal issues due by July 30, 1978. The trial court granted the respondent specific performance, and ordered petitioners to cooperate with the city of Pismo Beach so that respondent could obtain a lot line adjustment.

Thereafter, Petitioner appealed the decision of the trial court. Briefs were filed with the Appellate Court of the State of California, Fifth Appellate District. The Petitioners' contentions were that (1) the trial court exceeded its discretion by ordering the vendors to perform after the underlying contract had lapsed (in effect breathing life into a dead instrument); (2) that the trial court had erred further by ignoring the operative effect of leading California case authority identical in fact to the Petitioners' cancellation wherein a

cancellation of escrow upon the nonoccurrence of an event was held proper despite full performance by the purchaser [Moss v. Minor Properties (1968) 262 Cal. App.2d 847, 69 Cal. Rptr. 341 and Fogarty v. Saathoff (1982) 128 Cal. App.3d 780, 180 Cal. Rptr. 484]; and (3) the trial court erred by refusing to address the illegality and apparent impropriety which characterized the purchase offer (in which the true purchaser willfully placed the name of another on the escrow instructions) and in attainment of the unknown need for approval by a city board (in which Respondent's attorney was also the attorney for the city of Pismo Beach). Petitioner also set forth added grounds of material mistake, illegality and uncertainty.

The Appellate Court of the State of California, Fifth Appellate District, affirmed the decision of the trial court.

In so doing, the appellate court elected to let stand uncorrected the manifest injustice that had been perpetrated by the trial court on the Cardosa family. That hard working man of Portuguese extraction, who has a limited understanding of the English language, and is a stalwart citizen of this Republic, was told there was no merit in his contentions of error. Patently, the refusal of the appellate tribunal to remedy the errors of the trial court was in derrogation of the rights of due process held by all Americans and was repugnant to the Constitution and laws of the United States.

A petition for rehearing in the Appellate Court of the State of California, Fifth Appellate District, was summarily denied on December 30, 1982. The petition for hearing by the Supreme Court of the State of California was speedily and perfunctorily denied on

January 26, 1983. Only the Supreme Court of the United States of America can remedy the injustice done to Petitioner and establish once and for all that no state court is above the law or able to trample with judicial immunity on individual rights and freedoms.

A letter written in the Portuguese language by the Petitioner, Manuel Cardosa is attached hereto as Appendix "E". This letter sets forth Petitioner's contention that there are constitutional questions which must be determined by this Court.

REASONS FOR GRANTING THE WRIT

This case concerns the rights of citizens to make valid and binding contracts which will be enforced by the courts according to their express terms. It also concerns the court's power to substitute its own terms rather than the express agreement of the parties thereby

depriving the parties of their property without due process of law.

As this Court stated in Lassiter v. Dept. of Social Services 452 U.S. 18, 101 S. Cit. 2153, 2158, (1981)

> [T]he phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

It is well settled that fair play is the essence of due process, and due process is denied where, the procedure tends to shock the sense of fair play. Howard v. U.S. (C.A. Cal. 1967) 372 F.2d 294, cert. den. 87 S. Ct. 2129, 388 U.S. 915. It is also well established that a court cannot engage in any action which deprives the party before it of its constitutional rights. In re Baldinger

(D.C. Cal. 1973) 356 F. Supp. 153.

To establish a denial of due process, it must be shown that an invasion of some legally protected right occurred. City of Santa Clara, Cal. v. Kleppe (D.C. Cal. 1976) 418 F. Supp. 315, aff'd in prt. revd. in prt. 572 F.2d 660. Petitioner had a right not to sell his property. That right should have been legally protected by the courts of the State of California. Petitioner had no obligation to perform under the contract when the agreement between the parties was terminated in accordance with the express terms for cancellation of the instrument. Yet the courts of the State of California in effect executed a forced sale by reviving the contract after it had been terminated under conditions which had been agreed upon. The parties had freely negotiated the contract which specifically provided that either party could cancel

if escrow did not close by a certain date. Petitioners exercised their rights under this provision. Petitioner contends that this action by the trial and appellate courts of California constituted an invasion of a legally protected right, his entitlement to hold property, which resulted in a denial of due process under the Fourteenth Amendment of the United States' Constitution.

California law clearly provides that parties have the right to insist on the express provisions contained in their contracts. The contract at issue herein was a standard escrow contract which had a provision for cancellation. That provision stated:

> If you are unable to comply with these instructions on or prior to September 25, 1977, you will comply as soon thereafter as possible unless a written demand for return of money or instruments by a party to this escrow is received by you subsequent

> to such date and prior to recording of any instrument provided for herein.

This identical instruction has been consistently construed by California courts as giving both parties a right to cancel. See Moss v. Minor Properties, supra; Fogarty v. Saathoff, supra.

Petitioners herein cancelled escrow pursuant to the express terms of the escrow instructions. The Petitioners had fully performed by placing a duly executed and acknowledged grant deed into escrow. They waited a reasonable period of time after the closing date of September 27, 1977, and then cancelled because of the uncertainty and delay caused by the permit procedure which was necessary for the lot split. It must be pointed out that it was only necessary according to the title company, the buyer's agent, which company refused to record the deed as tendered by Petitioners. The purchaser

at all times prior to cancellation had the right to record the deed as tendered and secure the necessary city approval as owner of record. If the purchaser had elected to do this, both parties would have received the benefit of their bargain. Instead, the vendors were ordered by the trial court to assume the burden and bear the risk of time delay in securing the necessary permit. The trial court and the appellate court denied the vendors' right to cancel pursuant to the bilateral provision contained in the contract.

As was pointed out in the Petition to the California Supreme Court, attached hereto as Appendix "D", petitioners were denied their property and contract rights when they were ordered to specifically perform a contract which had been cancelled.

The appellate court's refusal to follow binding California law and the denial

of a petition for hearing by the California Supreme Court, thus upholding the appellate court's acts was equivalent to a retrospective law. When such a law deprives a person of a vested right or substantially impairs such a right it is a denial of due process. see e.g. Coombes v. Getz (1932) 285 U.S. 434, 52 S. Ct. 435.

Additionally, as was raised in the California appellate process, the entire transaction was tainted with illegality and the appearance of impropriety. The buyer substituted her mother's name on the pertinent documents because she was separated from her husband and "he was going through a lot of legal procedures." Petitioner pointed out to the appellate court and the California Supreme Court that this statement carries a strong inference that the respondent was trying to conceal the fact that she had sufficient

funds to purchase property. There was an imminent marital dissolution proceeding; the respondent's husband may have had a community property interest in the money.

A further inequity which was raised in the courts below is the appearance of impropriety by a government official. Respondent's attorney, Arthur Shaw, was also the attorney for the city of Pismo Beach. The city attorney's office is integrally connected with the zoning procedures and the permit process which is at issue herein. Such an instance of either actual or an appearance of impropriety should preclude respondent herein from the equitable remedy she received from the California courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

/s/ Roselyn C. Annin

ROSELYN COSTA ANNIN
Attorney for Petitioner

1255 Post Street, Suite 625
San Francisco, CA 94109
Telephone: (415) 474-8778

VERIFICATION

I, ROSELYN COSTA ANNIN, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of the State of California, and I have my professional offices at 1255 Post Street, Suite 625, San Francisco, California 94109.

I am the attorney of record for Petitioners in the above entitled matter.

Said petitioner is absent from the county in which I have my office and for that reason I am making this verification on their behalf.

I have read the foregoing petition and know the contents thereof.

I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 26, 1983 at San Francisco, California.

/s/ Roselyn C. Annin

Roselyn Costa Annin

APPENDIX

Appendix "A" - Opinion of the Court of Appeal, State of California, Fifth Appellate District, non published
5 Civil No. 5713
Filed November 30, 1982

Appendix "B" - Denial of Petition for Rehearing, Court of Appeal, State of California
Entered, December 30, 1983

Appendix "C" - Denial of Petition for Hearing, California Supreme Court
Entered, January 26, 1983

Appendix "D" - Petition for Hearing, California Supreme Court
Filed January 10, 1983

Appendix "E" - Letter written by petitioner, Manuel Cardosa

STATEMENT OF MAILING
(U.S. Sup. Ct. Rule 28.2)

I, ROSELYN C. ANNIN, declare:

1. I am a member of the Bar of the United States Supreme Court and was admitted to practice before that Court on April 5, 1982.

2. On April 26, 1983, I personally placed 40 copies of the Petition For Writ of Certiorari in a sealed envelope, first class postage thereon fully prepaid in United States Post Office mail box in San Francisco, California, and properly addressed to the Clerk of the United States Supreme Court. The mailing, which included payment as and for the established filing fee, was timely made within the time established for filing a Petition For Writ of Certiorari.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct

and that this Statement of Mailing was mailed in the City of San Francisco, California on this 26th day of April, 1983.

/s/ Roselyn C. Annin
Roselyn C. Annin

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) SS

On April 26, 1983, before me, the undersigned, a Notary Public in and for said state, personally appeared Roselyn C. Annin, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.

WITNESS my hand and official seal.

/s/ Kathleen M. Budd
(STATE SEAL) Notary Public for said County and State

CERTIFICATE OF SERVICE BY MAIL

BY ATTORNEY

I, ROSELYN C. ANNIN, declare:

I am an attorney duly licensed to practice law in the State of California; my law office is located at 1255 Post Street, Suite 625, San Francisco, CA 94109.

I am not a party to the within action.

On April 26, 1983, I served the within PETITION FOR WRIT OF CERTIORARI (in 5 Civil No. 5713--San Luis Obispo County No. 49694) by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid in a United States Post Office mail box at San Francisco, California, addressed to the respondent as follows:

Arthur Shaw, Jr., Esq.
Stuart & Shaw (3 copies)
981 Osos
San Luis Obispo, CA 93401

and to

Honorable James F. McKiernan
Judge Pro Tem - Superior Court
202 Courthouse Annex
San Luis Obispo, CA 93408

Court of Appeal
Fifth Appellate District
5002 State Building
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 26, 1983 at San Francisco, CA.

/s/ Roselyn C. Annin

Roselyn Costa Annin
Attorney at Law

APPENDIX "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LUCY M. MORALES Plaintiff and Respondent, v. MANUEL CARDOSA, et al. Defendants and Respondents.	5 Civil No. 5713 (Super. Ct. No. 49694) O P I N I O N

THE COURT*

APPEAL from a judgment of the Superior Court of San Luis Obispo County. James F. McKiernan, under assignment by the Chairperson of the Judicial Council, Judge. Affirmed.

*Before Zenovich, Acting P.J., Andreen, J. and Quall, J. (assigned by the Chairperson of the Judicial Council.)

Roselyn Costa Annin for Defendants and Appellants.

Stuart & Shaw, Lane Stuart and Arthur Shaw for Plaintiff and Respondent.

* * *

Defendants appeal from judgment decreeing specific performance of their contract to sell certain real property to plaintiff. They contend plaintiff is not entitled to specific performance because (1) they are unable to convey marketable title, and equity will not compel a vendor to litigate to clear title; (2) the contract cannot be lawfully performed; (3) the contract is uncertain (4) the contract is voidable because of the mutual mistake as to basic fact; (5) specific performance would require the assent of a third party or continuous supervision by the court; (6) and the contract had lapsed before the trial

court ordered specific performance.

We do not have the benefit of written findings of fact by the trial court, neither side having requested them. (See Code Civ. Proc., § 632.)

The record substantiates the statement of facts in respondent's brief, and we adopt it for the purposes of this opinion:

"STATEMENT OF FACTS"

> "In March of 1977, appellant Cardoza (sic) (vendor) approached respondent's daughter, Jo Emma Morales, and asked if she would buy his commercial property and building on four lots in the City of Pismo Beach . . . . At that time she said she wasn't interested, but he returned to her again in April to further discuss a possible sale to her, and he stated that his asking price was $95,000.00 . . . . Again, no deal was made, but in July, 1977, after she learned that another building she desired had been sold to others, Jo Emma contacted appellant to see if he was still interested in selling the property. He stated he would discuss it

with his wife, and that the price would be $95,000.00, and his terms for payment were also discussed . . . . Approximately two weeks later, appellant called Jo Emma and asked her to meet him at a hospital in his hometown of Tulare. They met there and he affirmed that he would sell on the previous terms as soon as the paperwork was ready . . . . Approximately one week later appellant telephoned Jo Emma and on July 28, 1977, she went with her mother, (respondent herein) to appellant's home in Tulare, where they met with both appellants and a Mr. Green, identified then as appellant's attorney. Notes and documents were prepared by Mr. Green and signed by appellant and respondent, including an agreement for sale of the real property at an increased purchase price of $98,000.00. Respondent was authorized to open an escrow for sale at the Bank of America in Pismo Beach . . . . (NOTE: The escrow was opened not in Jo Emma's name, but in that of her mother, the respondent herein, because Jo Emma was having legal problems with her then separated husband . . .)

"The original escrow instructions, executed by both parties and prepared on the basis of the documents drafted by Mr. Green on July 28, 1977, stated in part

as follows: 'This escrow is subject to an easement for driveway in Lot 4 (Westerly portion) 31.25' x 44.64' deep, plus angle to property line where wall ends, to be furnished by seller and approved by buyer, prior to close of escrow." . . .

"Jo Emma testified that she knew there was 'some kind of deal where Mr. Cardosa (appellant) could still use that driveway' . . . . to 'drive in and out' to his 'house next door' which he was retaining . . . . However, per their original conversations, both parties were to be able to use the driveway . . . . Later, 'at the very end' of escrow, appellant advised Jo Emma that the escrow instructions concerning the driveway were wrong, and she told him to have his attorney draw up new instructions the way he wanted them, that he could 'keep the driveway' . . . .

"Respondent did all things required of her under the escrow . . . ., and she kept trying to get escrow closed . . . . However, the escrow people told her in early November that they needed a legal description of the driveway property to close escrow. Jo Emma called appellant who said he would have his new attorney prepare the description . . . . Shortly thereafter, escrow received from the new attorney a copy of the legal description

dated November 7th, with the heading, 'this part not sold' . . . .

"Eventually, on November 9, 1977, after appellant had given Jo Emma the keys to the property and authorized her to take the escrow papers to the title company . . ., the escrow people advised Jo Emma that the title company would not insure title, and would not record the documents, without a legal description prepared by an engineer, not a lawyer . . . .

"However, appellant's new lawyer then advised Jo Emma that what was needed was a 'lot line adjustment' processed through the City of Pismo Beach . . . . Jo Emma immediately retained an engineer and, with the knowledge and approval of appellant's attorney . . . ., applied to the City for a lot line adjustment. City staff advised that a lot line adjustment was a very simple procedure . . . . However, the city required that the signature of appellant, the owner of all the property involved, be on the application. . . .

"The city representative then informed Jo Emma that appellant's new attorney had called to say that appellant would not sign the application for a lot line adjustment . . . .

> "Appellants gave no better reason for refusing to proceed with the application for the lot line adjustment than that 'we just decided we didn't want to sell it any more' . . .
>
> "The purchase price of $98,000.00 was a fair price to the seller . . . ."

The judgment recites findings "that the defendant MANUEL CARDOSA prevented performance of the contract of sale, and that the remedy of specific performance is appropriate to this action," then states that plaintiff is awarded judgment on her cause of action for specific performance; that defendants are ordered "to cooperate with plaintiff and with the City of Pismo Beach, including, without limitation, the execution of all documents and consents necessary to obtain a lot line adjustment from the City of Pismo Beach to effectuate the intent of the parties to leave the defendants with

an 'alley' to serve their adjoining property"; and that until an appropriate deed is recorded transferring the property to plaintiff, "the court reserves jurisdiction to enter such other and additional orders as may be necessary or appropriate to accomplish said transfer."

DISCUSSION

(1) Contention: "When a vendor cannot convey marketable title, equity will not compel vendor to litigate to clear title."

This is undoubtedly true as a general rule, but it hardly applies to the facts of this case. Appellants can convey marketable title to the property they agreed to sell. It is not necessary for them to "litigate" in order to perform the contract. They need only cooperate in the obtaining of a simple lot line adjustment which the evidence shows

the city will approve as a matter of course. This is not a case of a defective or clouded title. It appears to be, rather, a case of change of mind about selling the property.

The cases appellants cite in support of their contention all involve genuine title defects and bear so little resemblance to the present case on their facts and on the issues presented that it would be pointless to discuss them.

(2) Contention: "Specific performance cannot be granted if a contract cannot be lawfully performed."

Again the proposition is generally true, but it is inapplicable here. The judgment does not require appellants to do anything unlawful.

(3) Contention: "A contract which is uncertain cannot be specifically enforced."

The "uncertainty" appellants would have us perceive in the contract is that it "does not specify who is to bear the expense and time delay of the administrative process" necessary for obtaining the lot line adjustment. Appellants fail to cite, however, any evidence that the procedure for obtaining the lot line adjustment is likely to be expensive or time consuming. Indeed, appellants concede that the issue was not even raised in the trial court. If it had been raised, the court could have determined whether the issue had any substance in terms of a likelihood that any considerable expense or delay would be involved in obtaining the lot line adjustment and, if so, how the matter should best be resolved. Since the trial court has--quite appropriately--reserved continuing jurisdiction until the deed is recorded, if the problem apellants have conjured up here should become

a real one, the trial court will be able to deal with it in further proceedings.

(4) Contention: "The contract is voidable because of mutual mistake as to a basic fact."

Granting that the parties were mutually unaware a lot line adjustment approved by the city would have to be obtained before the agreed sale could be consumated, it is clear from the evidence that this "mistake" is hardly one "which affects an essential element of the contract and is harmful to one of the parties" (Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 884). As Guthrie-- cited in appellants' opening brief-- also states: "A contract is voidable for mistake only if enforcement would be materially harmful or more onerous to the party seeking avoidance than it would have been had the law or the facts been as believed. (Citations.) This is a necessary

corollary of the principle that the mistake, whether of law or fact, must materially affect an essential element of the contract. (Citations.) A party seeking to rescind the contract must show he has suffered material injury or prejudice although he need not show pecuniary loss. (Citations.)" (Id., at p. 886, emphasis added.)

Civil Code section 3391, subdivision 4, provides that specific performance of a contract cannot be enforced against a party if his assent to the contract was given under the influence of mistake (subject to an exception not pertinent here). Appellants have not cited any evidence, however, that their assent to the contract with respondent was given under the influence of the "mistake" here discussed.

In sum, the "mistake" was not one that would justify rescission of the contract by appellants or deprive respondent

of the right to specific performance.

(5) Contention: "A contract cannot be specifically enforced if it requires the assent of a third party or continuous supervision by the court."

Again, appellants' contention does not fit the facts according to the evidence. The City of Pismo Beach cannot arbitrarily withhold its approval of the lot line adjustment and thus frustrate performance of the contract. Indeed, the evidence indicates that the City will readily grant approval if a proper application is made by appellants.

Nor do we see any basis for supposing that specific enforcement of the contract will require "continuous supervision by the court." Under the judgment, the court retains jurisdiction only until the deed is recorded. In the absence of some unforseen difficulty or problem, no supervision at all by the court will be

required.

(6) Contention: "The trial court erred in ordering the contract to be performed after the contract had lapsed."

This final contention of appellants is likewise without merit. According to the evidence, respondent did everything she was required to do under the contract well within the time specified. The delays which made the contract "lapse" can for the most part be charged to inaction by appellants or their attorneys which appear to have been inspired mainly by a change of mind on appellants' part about selling the property. Some delay in closing the escrow would have been caused in any event by the procedure for obtaining the lot line adjustment, but the evidence supports an implied finding by the trial court that this amount of delay would not have materially breached a condition for appellants' performance

of the contract.

CONCLUSION

In sum, we find no merit in any of appellants' contentions of error.

Respondent has urged positive reasons for affirming the judgment, and we find them convincing, but it is unnecessary to incorporate them in this opinion. The judgment is presumed correct. Error must be affirmatively shown; none has been shown here. (Walling v. Kimball (1941) 17 Cal.2d 364, 373; 6 Witkin, Cal. Procedure (2d 3d. 1971) § 235.)

The judgment is affirmed.

APPENDIX "B"

IN THE

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

LUCY M. MORALES, Plaintiff and Respondent, v. MANUEL CARDOSA et al., Defendants and Respondents.	5 Civil No. 5713 (Super. Ct. No. 49694)

BY THE COURT: *

The petition for rehearing in the above entitled action is denied.

Dated: December 30, 1982

/s/ Zenovich
Acting P.J.

* Before Zenovich, Acting P.M., Andreen, J., and Quall, J. (assigned by the Chairperson of the Judicial Council).

APPENDIX "C"

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, Civil No. 5713

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

MORALES

v.

CARDOSA et al.

Appellants' position for hearing is DENIED.

/s/ Bird

Chief Justice

APPENDIX "D"

5 Civil No. 5713

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

LUCY M. MORALES, Plaintiff and Respondent, v. MANUEL CARDOSA and MARY L. CARDOSA, Defendants and Appellants.	)	5 Civil No. 5713 (San Luis Obispo County No. 49694)

APPELLANTS' PETITION FOR HEARING

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5 CIVIL NO. 5713

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

LUCY M. MORALES, Plaintiff and Respondent, v. MANUEL CARDOSA and MARY L. CARDOSA, Defendants and Appellants.	5 Civil No. 5713 (San Luis Obispo County No. 49694)

APPELLANTS' PETITION FOR HEARING

TO THE HONORABLE ROSE BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioners, defendants and appellants, respectfully petition for a hearing in the Supreme Court to consider the

decision filed in the Court of Appeal, Fifth District, affirming the judgment of the trial court in favor of plaintiff and against defendants in the above entitled action, filed on November 30, 1982, a copy of which is attached hereto, labeled "Exhibit A", and incorporated herein by reference.

Appellants filed a Petition for Rehearing by the Court of Appeal on December 17, 1982. This Petition for Rehearing was denied on December 30, 1982.

I. GROUNDS FOR HEARING IN THE SUPREME COURT

Petitioners respectfully request a hearing in this Court pursuant to California Rules of Court, section 29(a) on the ground that a hearing and opinion by the Supreme Court is necessary to secure a uniformity of decision, including the settlement of important questions of law at issue herein.

II. ISSUES OF LAW PRESENTED

A. WHETHER A SELLER OR BUYER OF REAL PROPERTY IS ENTITLED TO CANCEL ESCROW AFTER THE DATE FOR CLOSING HAS LAPSED.

B. WHETHER THE APPELLATE COURT FAILED TO CONSIDER SUBSTANTIAL ISSUES OF LAW AND FACT WHICH WERE RAISED IN THE PETITION FOR REHEARING.

III. INTRODUCTION

There are two appellate cases which have addressed the first issue presented herein. These cases are Moss v. Minor Properties (1968) 262 Cal. App.2d 847, 69 Cal. Rptr. 341, which is a decision of the Second Appellate District, and Fogarty v. Saathoff (1982) 128 Cal. App.3d 780, 180 Cal. Rptr. 484, which is a decision of the Fourth Appellate District. Both opinions addressed the issue and held that there was a right to cancel. The Fifth Appellate District, in the instant case, overlooked these decisions and

reached a contrary result.

The issue presented in the instant petition is of vital importance not only to petitioners herein but to all prospective vendors and purchasers of real property and their escrow holders. It is imperative that parties know how long they are required to keep escrow open without running the risk of a lawsuit for specific performance if they cancel pursuant to the terms of the instructions. Although the decision in the instant case will not be published, there is in actuality a conflict in the circuits since the Fifth Appellate District disregarded the two cases on point and reached a contrary result. This Court has not as yet determined the issue.

Additionally, the Appellate Court omitted material facts in its opinion and failed to consider substantial legal

issues. These points were raised in Appellants' Petition for Rehearing in the Appellate Court.

IV. STATEMENT OF THE CASE

This case arises out of a purchase and sale of real property. The escrow was required to close, pursuant to the escrow instructions, on September 25, 1977. The deed reserving the driveway to the vendor and the purchase price as agreed upon by the parties were delivered to the escrow holder. The title company refused to record because the deed contained an illegal lot split. In order to comply with the local zoning ordinance, the vendors (appellants and petitioners herein) would have to obtain a lot line adjustment from the city's planning commission. Upon learning of this requirement and the delay before escrow could close, the vendors, on December 2, 1977, cancelled escrow. On February 9, 1977, the purchaser filed

suit for specific performance. The trial court granted the purchaser specific performance and ordered the vendor to cooperate with the purchaser and the city to obtain the necessary permit for the lot line adjustment. The vendor appealed, and the Appellate Court affirmed the decision of the trial court. A Petition for Rehearing in the Appellate Court, in which appellants requested the court to consider the issue of law set forth herein, was denied.

V. ARGUMENT

POINT I

WHERE THE ESCROW INSTRUCTIONS CONTAIN A BILATERAL RIGHT TO CANCEL, THE TRIAL COURT CANNOT ORDER SPECIFIC PERFORMANCE AFTER THE CONTRACT HAS LAPSED AND ONE OF THE PARTIES HAS EXERCISED THE RIGHT TO CANCEL.

The escrow instructions in the instant case contained a provision for cancellation which is standard in most escrow instructions. See e.g. Moss v. Minor Pro-

perties, supra at 849, Cal. Rptr. 343. (instructions identical to those at issue herein). The instructions in the case at bar stated:

> If you are unable to comply with these instructions on or prior to September 25, 1977, you will comply as soon thereafter as possible unless a written demand for return of money or instruments by a party to this escrow is received by you subsequent to such date and prior to recording of any instrument provided for herein.

These instructions have been construed by the appellate courts, other than in the instant case, as giving each of the parties a right to cancel. Moss v. Minor Properties, supra; Fogarty v. Saathoff, supra.

In the instant case, prior to the time vendors deposited the deed into escrow, neither party was aware that the city of Pismo Beach was required to approve the reservation of the driveway to the vendor. The reservation of the driveway constituted an illegal lot split,

and it would be necessary to obtain a permit for a lot line adjustment in order to comply with the zoning ordinance. The title insurance company refused to record without the permit. Because of the delay necessitated by the administrative procedure to obtain the permit, the vendors cancelled escrow according to the provision in the instructions set forth supra.

The Appellate Court stated in its decision that this is not a case of defective or clouded title, completely ignoring the actual fact that the purchaser was unwilling to accept the title agreed upon and tendered to them. If the purchaser were willing to accept title as tendered, she should have communicated her offer to so accept within a reasonable period of time. Waneda Corp. v. Dispaltro (1964) 225 Cal. App.2d 187, 37 Cal. Rptr. 267. However, the purchaser refused

title as tendered, did not record the deed, and would not accept title unless the vendor secured the necessary permit.

The trial court exceeded its powers in ordering specific performance where the time specified in the escrow instructions had lapsed and the vendors exercised their right to cancel. In Moss v. Minor Properties, supra, the deed and purchase price had been placed in escrow. The escrow holder failed to record due to an erroneous conclusion that the beneficiaries' consent was a prerequisite to the transfer of the trustor's interest. The seller cancelled escrow the day after it was supposed to close since the deed had not been recorded. The appellate court upheld the trial court's decision denying specific performance to the buyer. In its decision, the court stated:

> The right to make a written demand for return of the money or instruments was an integral,

> clear and unequivocal clause in the instructions. Even if time was not of the essence, and even if it could be found that there had been a waiver of the precise time of performance, nowhere has it been suggested in the evidence * * * that respondents waived their right to make written demand for return of their money after * * * escrow period concluded. Were they to be denied that right, the court in effect would be altering the express terms of the contract. Neither a trial nor appellate court has power to rewrite a contract. (emphasis added)

Id. at 853, Cal. Rptr. 345.

Similarly, in Fogarty v. Saathoff, supra, the seller had deposited the deed in escrow but, due to some problems with the bank, the buyer had not deposited the purchase price. The seller waited one week, then advised the escrow holder to cancel escrow. The trial court granted specific performance, and the appellate court reversed. The trial court held that the buyer was not in breach because he could have performed within a reasonable

period of time. Notwithstanding this finding, the appellate court held that the express right to cancel pursuant to the escrow instructions could not be abrogated by the trial court since the denial of the right would be an alteration of the express terms of the contract.

In the instant case, the vendors cancelled escrow pursuant to the express terms of the escrow instructions. The vendors had fully performed by placing a duly executed and acknowledged grant deed into escrow. They waited a reasonable period of time after the closing date of September 27, 1977, and then cancelled because of the uncertainty and delay which resulted from the permit procedure. The purchaser at all times prior to cancellation had the right to record the deed as tendered and secure the necessary city approval as owner of record. If the purchaser had elected to this both parties

would have received the benefit of their bargain. Instead, the vendors were ordered by the trial court to assume the burden and bear the risk of time delay in securing the necessary permit. The trial court and the appellate court denied the vendors' right to cancel pursuant to the bilateral provision contained in the contract. These decisions were contrary to California law.

It should be noted that real property is unique to the seller as well as to the buyer. The contract was drafted with this in mind, and both parties agreed on the amount of property to be conveyed as well as the time period they were willing to wait for escrow to close. In ordering the vendors to specifically perform the contract, in violation of the express terms of the contract, the sellers are being denied their property as well as their contract rights. This Court should accept this petition for hearing to

correct this injustice as well as to clarify the law.

POINT II

SUBSTANTIAL LEGAL AND FACTUAL ISSUES RAISED IN THE BRIEFS AND IN THE PETITION FOR REHEARING WERE NOT CONSIDERED BY THE COURT OF APPEAL IN RENDERING ITS OPINION.

As pointed out in the Petition for Rehearing, the appellate court refused to consider the legal argument as to whether appellants could convey marketable and incorrectly stated at page seven of the decision that appellants did not cite any evidence that their assent was given under the influence of mistake. The evidence was cited in Appellants' Opening Brief at pages 9 through 11 and Appellants' Reply Brief at page 3 lines 6 through 15. (R.T. 18:2-5; 23:15-19; 72:15-22; 80:1-10; 85:13-15). The result of these errors was seriously prejudicial to petitioners and underscores their dilemma in the instant situation.

If the title as agreed upon and as delivered to the purchaser was not defective, then the purchaser should have accepted it. She refused to do so apparently unwilling to bear the risk of whether or not the city would be willing to grant the permit or to bear the burden of the time delay before the deed would comply with the local zoning ordinance. Yet the appellate court refused to consider appellants' argument stating that "(t)he cases appellants cite in support of their contention all involve genuine title defects and bear so little resemblance to the present case on their facts and on the issues presented that it would be pointless to discuss them." Opinion p. 5.

Additionally, in their decision, the appellate court stated that "(a)ppellants have not cited any evidence, however, that their assent to the contract with respon-

dent was given under the influence of the "mistake" here discussed." Opinion, p. 7. If the mistake was immaterial or did not exist so as to render title defective, then the purchaser could have recorded the deed as tendered, received approval for the lot line adjustment and received her policy of title insurance. However, she was unwilling to so act and did not do so. Instead, the vendors were required to assume the risk and responsibility for securing a lot line adjustment which neither party knew would be necessary and did not provide for such a contingency in the contract. The vendors did not assent to a contract which required them to obtain a permit for a lot line adjustment. Their assent was given under the influence of a mistake. The mistake was that both parties thought that the sale could be consummated by drafting a deed with a reservation of the driveway

to the vendors and by delivering this deed to the purchaser. In other words, the mistake was an unknown fact that a permit would be necessary. The permit procedure caused a time delay which was a burden that the trial court ordered the vendors to bear. During this period property values were rising and money values were falling thereby prejudicing the vendors. They were ordered to perform a contract to which they did not agree. Such an order was beyond the power of the trial court, and the appellate court should have reversed the decision.

POINT III

SPECIFIC PERFORMANCE IS AN EQUITABLE REMEDY AND THE APPELLATE COURT FAILED TO CONSIDER THE TAINT OF ILLEGALITY AND APPEARANCE OF IMPROPRIETY WHICH DEFEAT EQUITABLE CLAIMS.

At oral argument and in the Petition for Rehearing, appellants brought to the attention of the appellate court two equitable arguments. The first is that

the entire transaction was tainted with illegality. Jo Emma Morales, the true buyer, substituted her mother's name on the document entitled Escrow Instructions because Jo Emma was separated from her husband and "he was going through a lot of legal procedures." This statement carries a strong inference that Jo Emma was trying to conceal the fact that she had $24,500.00 to lodge with the escrow holder the purchase real property. There was an imminent marital dissolution proceeding, and her husband may have had a community property interest in the money. The concealment of the fact that Jo Emma was the true buyer, rather than her mother Lucy Morales, would be a fraud upon Jo Emma's husband as well as upon the court. Since the respondent did not come into court with clean hands (respondent Lucy Morales conspired with Jo Emma Morales to practice deceit and fraud, as

above stated), this Court cannot permit the trial court to condone an illegality and grant the relief requested by the plaintiff-respondent, and therefore specific performance should be denied and her complaint dismissed.

A further inequity which appellants raised at oral argument and in their Petition for Rehearing is the appearance of impropriety by a government official. Arthur Shaw is the city attorney for the city of Pismo Beach and is called upon to advise and counsel the city regarding its actions involving real property in the city of Pismo Beach. At the same time, Arthur Shaw was the attorney for the purchaser herein. He prepared the statement of facts for the respondent to include in her opening brief and stated that the "city staff advised that a lot line adjustment was a very simple procedure ..". Presumably Arthur Shaw was also a mem-

ber of the city staff.

There is a semblance of impropriety in the fact that Arthur Shaw not only was the attorney for respondent but was and is the attorney for the City of Pismo Beach (and for the City of San Luis Obispo). City of Imperial Beach v. Bailey (1980) 103 Cal. App.3d 191, 162 Cal. Rptr. 663, held that Section 1090 of the Government Code has a purpose not only to strike at actual impropriety, but also to strike at an appearance of impropriety. The city attorney's office is integrally connected with the zoning procedures and has superior knowledge of whether the Coastal Commission would have approved respondent's plans to establish a Mexican disco.

This is another instance of a tainted situation in the instant case. The respondent should not be permitted to prevail when her attorney comes into court

with either actual or an appearance of impropriety. Appellants have no adequate remedy at law to right the wrong done to them. Respondent does. Respondent can sue her attorney for malpractice or sue the title company for refusing to record. Respondent should not prevail on the basis of 'inside political' assistance.

VI. CONCLUSION

WHEREFORE, petitioners respectfully request that this Court grant this petition for hearing and order the within appeal transferred to it.

DATED: January 10, 1983

Respectfully submitted,

/s/ Roselyn C. Annin

ROSELYN COSTA ANNIN
Attorney for Appellant
and Petitioner

CERTIFICATE OF SERVICE BY MAIL

BY ATTORNEY

I, ROSELYN C. ANNIN, declare:

I am an attorney duly licensed to practice law in the State of California; my law office is located at 1255 Post Street, Suite 625, San Francisco, CA 94109.

I am not a party to the within action.

On January 10, 1983, I served the within APPELLANTS' PETITION FOR HEARING (In 5 Civil No. 5713--San Luis Obispo County No. 49694) by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, First Class Mail, in a United States Post Office mail box at San Francisco, CA, addressed to the attorneys for respondent as follows:

Arthur Shaw, Jr., Esq.
Stuart & Shaw
981 Osos
San Luis Obispo, CA 93401

and to:

Honorable James F. McKiernan
Judge Pro Tem - Superior Court
202 Courthouse Annex
San Luis Obispo, CA 93408

Court of Appeal
Fifth Appellate District
5002 State Building
Fresno, CA 93721

and filing personally the original and fourteen (14) copies with the

Clerk of the Supreme Court
State Building, Room 4050
350 McAllister
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 10, 1983, at San Francisco, CA.

/s/ Roselyn C. Annin

Roselyn C. Annin
Attorney at Law

APPENDIX "E"

AO TRIBUNAL SUPREMO DOS ESTADOS UNIDOS:

Eu sou Manuel Cardosa, um apelante neste caso. Eu faço este apelo ao tribunal supremo dos Estados Unidos para explicar em português (a única lingua em que eu posso escrever e ler) o meu argumento em que este caso tem questões constitucionais:

1. O tribunal superior do condado de San Luis Obispo, estado de California, não tinha jurisdicção em Fevreiro de 1978 nem em Marzo de 1980, porque o contrato em "escrow" entre eu, a minha mulher, e a respondente Lucy Morales já estava cancelado. Foi cancelado em novembre de 1977.

2. O juiz (um "commissioner") fez um contrato novo para nós, os Cardosas, em Marzo de 1980, quando a juiz fez a sua decisão.

3. Acho que o acto de fazer um contrato para um vendedor de terra em favor do comprador por um juiz dum tribunal do Estado de California é um acto sem autorização e jurisdicção; em fim, é um acto que vai contra a constituções do estado de California e dos Estados Unidos.

4. É um acto que, se o tribunal superior de San Luis consegue em fazer-nos comprir com o tal contrato que não esiste e nao existia em Novembre de 1977, tem de consequencia deprivar-nos de nossa propriedade.

5. É um acto que tem o mesmo poder que um acto dum dictador.

6. Outro ponto que eu acho que é uma violação é que o advogado da respondente era em Fevreiro de 1978 e continua a ser "City Attorney" de cidade de Pismo Beach e da cidade de San Luis Obispo. A propriedade que está em disputa neste

caso fica situada na cidade de Pismo Beach, condado de San Luis Obispo. O advogado da cidade de Pismo Beach, com certeza, tem que fazer decisões para e dar conselhos à cidade sobre as leis que regulam as propriedades da cidade. Por isso, penso que há e havia um conflito entre a posição do advogado como representante da respondente e a sua posição como advogado do governo. Acho que há uma impropriedade nesta relação de advogado e cliente.

7. Outro ponto que eu acho em que há uma violação: Eu de primeiro fiz o contrato oralmente para vender a propriedade com a filha da respondente. A filha não quis ser nomeado no caso porque estava correndo um caso de divórcio contra o seu marido e não queria que o marido (nem o tribunal) soubesse que ela tinha dinheiro para empregar numa compra de pro-

priedade. Acho que esta violação é um acto de enganar o tribunal; é um acto que é quase criminal. Por isso, o tribunal superior do condado de San Luis Obispo, Estado de California, não tinha jurisdicção. A respondente não chegou ao tribunal com "mãos limpas."

Eu pedi a minha advogada que assinasse para mim esta carta porque eu estou mais de quatro horas de viagem por automóvel do seu escritório. Eu estou na cidade de Tulare, condado de Tulare, California; e a minha advogada tem o seu escritório na cidade de São Francisco, estado de California.

Submeto o escrito acima respeitosamente,

/s/ Manuel Cardosa

by Roselyn C. Annin